Buenos Aires, January 24, 2019

**REF: CED/C/15/2**

Dear members of the

**Committee on Enforced Disappearances**:

Estela Barnes de Carlotto, in my duties as President of Asociación Abuelas de Plaza de Mayo (Argentina), I am writing to you with the aim of sending the commentaries and contributions to the Committee’s **“Draft guiding principles for the search for disappeared persons”**, as developed by the Legal Team of our Association.

Yours sincerely

 

**Estela de Carlotto Alan Iud**

**President Coordinator**

 **Legal Team**

Contribution of *Asociación Abuelas de Plaza de Mayo* to the “Draft guiding principles for the search for disappeared persons” (CED/C/15/2)

**General Comment:**

We deem it necessary for the standpoint of the Project to incorporate the very particular situation concerning the children victims of forced disappearance, whose identity was modified at an early age and which article 25 of the Convention specifically refers to.

Our contributions focus on this issue and are built upon our long-standing experience of more than 41 years looking for our grandchildren, who were kidnapped during the last military dictatorship suffered by Argentina (1976-1983), or a few months before its start. Those children were raised with no awareness of their true identity and, consequently, without knowing that their parents had been victims of enforced disappearance. Since the majority of them are still missing, the “Guiding principles for the search of disappeared persons”, as eventually adopted by the Committee, will be indisputably applicable.

Furthermore, it is necessary to notice that similar phenomena of massive human rights violations took place in other countries in America – such as Guatemala or El Salvador- and Europe – e.g. Francoist Spain, or the Democratic Republic of Germany with forced adoptions-; experiences of this kind, therefore, should not be deemed as isolated or exceptional but, rather, are to be taken into account when it comes to elaborate universal principles, such as those promoted by the Committee, especially considering the clear provisions expressed in article 25 of the Convention.

In our opinion, the Principle 14 proposed in the Project does not completely fulfill this need of a differential approach, since it only refers to disappeared children and adolescents, without mentioning the cases of those who, having already come of age, are still disappeared and had their identities modified.

**Principle 4. The search should be carried out with a strategic approach.**

Although point 4.1 states that “at the start of the search, all reasonable hypotheses concerning the person’s disappearance should be explored”, we deem it necessary to emphasize that the formulation of such hypotheses must consider the possible modification of the victim’s identity documents; this especially concerns the cases of newborn babies or very young children who were assigned to social protection institutions or were adopted as abandoned or unidentified.

Furthermore, even though point 4.5 mentions the importance of carrying out a contextual analysis, and point 14.2 stresses the need to pay special attention to cases involving disappeared children and adolescents, it would be advisable if the proclaimed differential approach resulted in the formulation of investigation hypotheses.

For this reason, we propose a new section to be incorporated into Principle 4, with the following text:

“4.6.- The search for and the investigation of the disappearance of newborn babies or very young children should be carried out by taking into account the possibility that their identity documents have been modified or that they have been assigned to social protection institutions or adopted as abandoned or unidentified children. The fact that the ambulatory freedom of these children and adolescents has not been restricted cannot be invoked to justify a failure to investigate their cases as forced disappearances”.

**Principle 6. The search should be effective.**

Paragraph 4 should consider that, as far as the search for kidnapped children is concerned, the most sensitive information can be frequently found in institutions in charge of the adoption process, the Civil Registry or the social protection system. Likewise, on some occasions, it can be necessary to access information managed by private entities, such as enterprises, hospitals or schools. It is convenient, therefore, to emphasize that the access to information, documents or database can include private entities and cannot be restricted, neither for national security reason nor because of the privacy of third persons.

We consequently propose the following writing for the Principle 6.4:

“6.4.- The authorities responsible for the search should have unrestricted access to all information, documents and databases that they consider necessary to search for and locate disappeared persons, including those concerning national security or containing personal information of others individuals or are managed by private entities”.

Regarding paragraph 8.B of Principle 6, we must point out **our deep concern about the writing proposed in the Project, inasmuch as it denies the possibility to obtain DNA samples without the prior consent of the victim or his/her relatives. As far as the aims of our Association are concerned, a significant reformulation of the aforementioned Principle is INDISPENSABLE.**

It is of fundamental importance for the Committee to take into account the Argentinean experience, in order to consider the cases of victims who were raised without knowing their identities, in an environment of hostility towards their biological families. As a consequence, in Argentina many of those who are deemed to be our potential grandchildren, once they have come of age, deny their consent to realize the DNA analysis, alleging feelings of gratitude towards the families who raised them, concern about the legal consequences they could incur in or, purely, lack of interest in knowing their biological identity.

In 2009, a decision of our National Supreme Court recognized the right of the grandmothers searching for their kidnapped grandchildren to obtain DNA samples from adults who could potentially belong to that category, even without their consent. On that occasion, the Court evaluated the duty of the State to investigate enforced disappearances and crimes against humanity and, particularly, the right to the truth of the disappeared person’s relatives. Furthermore, it was contemplated that, while those relatives should be also considered as victims of forced disappearance, there is no certainty about the fact that the person whose DNA is required is effectively a victim him/herself.

In conclusion, the Court established that in such cases the State should obtain DNA samples of the alleged victim through alternative methods that do not involve bodily interference, such as the analysis of personal objects –e.g. a toothbrush or intimate wear-, authorizing with this aim the forceful entrance to their domicile and other special investigation techniques. In case these alternative methods turn out to be ineffective, the direct bodily interference –in order to obtain blood, saliva or epidermal cells- can be allowed[[1]](#footnote-1).

In the same year, the Argentinean State signed a Friendly Settlement Agreement with our Association, in the framework of an ongoing petion before the Inter-American Commission on Human Rights, through which it committed to legislating more precisely on this procedure[[2]](#footnote-2). As a matter of fact, the law was approved by the National Congress shortly afterwards[[3]](#footnote-3).

As evident, although such procedures to obtain DNA analysis are admissible, they should not be treated under the same standards as those involving the consent of the victims. For this reason, it is necessary to guarantee that:

1. The gathering of the DNA sample is ordered by a judge.
2. The procedure is ordered following an investigation that verified the reasonability of the hypothesis that the subject could be a disappeared person. The DNA analysis, without having previously obtained the consent, should not be the first investigation measure to be considered.
3. The DNA sample should be gathered in the least harmful and coercive possible way for the individual to be identified, as long as it provides enough certainty about the result.

Moreover, it is important that the Principles do not close the door on further ways to obtain DNA samples that seem not so far away, considering the significant scientific progress and the recent trend of criminal investigation worldwide in this field. We are specifically referring to the so-called “DNA banks”, which can either be universal or cover a determined population of massive dimensions. At the present moment, there are a great number of countries having a DNA bank of their population, formally deposited into the criminal justice system. The DNA samples are normally obtained for purposes of criminal investigation, without the consent of the individual. Inasmuch as the search for disappeared people can constitute a criminal investigation itself, the Principles should not restrict the possibility to use the samples obtained in other contexts in order to determine whether a victim of forced disappearance has been located, or for other investigative purposes[[4]](#footnote-4). This could be the case of a person whose DNA is deposited into those banks as he/she is the suspected author of a crime, as well as that of someone who was kidnapped as a newborn baby[[5]](#footnote-5), or a person who has lost any contact with the family.

As a reverse side of the issue, the Committee should also consider that the biological relatives of the disappeared person might not be interested in his/her search or even be responsible for or involved in the disappearance itself[[6]](#footnote-6). At the same time, the disappeared person might be claimed by a different part of his/her family or by other people with whom he/she had a close personal bond, such as spouses, partners or militancy comrades.

The normal procedure to follow in order to obtain a trustworthy identification of a disappeared person is to gather DNA samples from his/her closest biological relatives (both parents, who can be substituted by grandparents and siblings, if need be). For this reason, **the Committee should consider the possibility, if necessary, to obtain a DNA sample of the victim’s relatives, even without their consent**[[7]](#footnote-7)**.** Noticeably, this might happen not only if required by the family members or close people committed to the search, but also in the interest of the disappeared person him/herself, who can eventually realize a voluntary DNA analysis, but will not be able to obtain a response if the samples of his/her relatives have not been deposited into the bank.

Likewise, the Committee should take into account that phenomena involving children kidnapping, such as those occurred in Argentina, El Salvador or Guatemala could repeat themselves and, consequently, it might be necessary to **obtain DNA samples from children and adolescents**. Without harming their will and right to be heard, according to the principle of progressive autonomy protecting these categories, the Committee should consider that those who normally act as their legal representatives are potentially responsible for or involved in their forced disappearance, or may have a strong personal interest in obstructing the realization of the DNA analysis. In this context, any recommended measure concerning the DNA gathering should respect the specificities of children and adolescents, clearly stating that the analysis cannot be impeded by those who exercise their legal representation or are registered as their parents.

On the other hand, the Committee should evaluate that, in case of massive phenomena of enforced disappearance of children whose identity is modified, the possibility of equally massive mechanisms of DNA gathering could be considered. For instance, it could be stipulated that all the children adopted or enrolled in the Civil Registry in a certain period must be subjected to DNA analysis, exclusively with the aim of determining whether they are victims of enforced disappearance. Although such measures would require a more detailed evaluation –concerning both its scientific feasibility and its compatibility with international Human Rights law-, **it is crucial that these Principles do not restrict excessively the possibility to implement massive mechanisms of DNA gathering.**

We also deem it necessary to warn that the draft omitted to mention the utilization of DNA samples for criminal procedures or to claim reparations, as it is stated in Article 19 of the Convention.

For the above-mentioned reasons, we propose a new wording for the Principle 6.8.B, with the following text:

“6.8.b) Procedures for the gathering of DNA samples guarantee the confidentiality of the victims and the exclusive utilization of the samples in order to identify and locate the disappeared person, without prejudice to the utilization of such information in criminal proceedings concerning forced disappearances, or within the exercise of the right to obtain reparation”.

**Likewise, we propose the incorporation of the following subparagraphs:**

6.8.d) States must obtain DNA samples from the potential victims and his/her relatives on a voluntary basis. In case they do not give their consent, States must establish other methods to obtain such samples by taking into account the peculiar condition of the potential victims, in order to avoid their further victimization and to protect their specific rights, using gathering techniques that do not require their cooperation.

6.8.e) In case the potential victims are children or adolescents, the DNA gathering proceedings must guarantee their right to be informed and heard, following the principle of progressive autonomy. Under no circumstance may their legal representative have the possibility to condition or influence the DNA analysis.

6.8.f) In situations of massive phenomena of enforced disappearances affecting very young children as potential victims of kidnapping and identity alteration, the authorities must drive massive mechanisms of DNA gathering, in order to allow for their quick identification.

**Principle 7. The search should be informed.**

The peculiarity of the search for children and adolescents must be also reflected in registers of and databases on disappeared persons.

For this reason, we propose the addition of a new subparagraph following Principle 7.1:

“7.1. States must establish specific registers of disappeared children and adolescents”.

Our experience showed that, unfortunately, disappeared persons who die are registered in the death registration systems and in the graveyards as unidentified persons (NN), and their bodies are cremated or buried in mass graves. This is why it is necessary to establish clear and distinguishable registers for these cases and to facilitate the crossing of information with those concerning disappeared persons. Although paragraph 7.2 refers to the access to “relevant registers”, we deem it convenient to make an express recommendation in this sense, which is why we propose the addition of the following paragraph:

“7.3. States must establish national registers of dead and unidentified persons, whose data can be crossed with those contained in the registers of disappeared persons. States must preserve these persons’ bodies until their identity has been established and their family has been informed”.

**Principles 8 and 9. The search should be coordinated. The search should be independent.**

Although the centralization or coordination of the search is a valuable objective, it is also necessary to protect the independence and the autonomy of the various organisms that are able to intervene in the process. The search frequently involves administrative entities, criminal investigation agencies, State institutions working with human rights, special investigation commissions (particularly in cases of massive disappearances), public prosecutors offices and courts. The centralization or coordination should not imply a reduction of the independence of judicial organisms and public prosecutors. Likewise, public human rights institutions[[8]](#footnote-8) and special investigation commissions[[9]](#footnote-9) should be guaranteed independence and autonomy.

In practice, the independence of these organisms is frequently restricted by the institutional dependence of the auxiliaries for the search, such as investigative police or other criminal investigation agencies or experts, on the Executive Power. For this reason, we consider it necessary to strengthen the recommendations concerning the centralization and independence of the search, adding the following paragraph to Principle 9:

“9.4. Under no circumstance may the centralization or coordination of the search be used to restrict the independence of the intervening entities. States must also guarantee the independence of the auxiliary bodies of the investigation, such as investigative police, criminal investigation organisms and scientific experts collaborating to the search”.

**Principle 12. The search should be participatory.**

Although the first paragraph of this Principle is quite broad, we deem it convenient that it includes an express mention to victims’ organization and to human rights protection generally speaking. Our experience shows that the victims have more possibilities to be heard and to address pressures or threats if they are organized. The Principles should, therefore, recognize the importance of the collective organization of the victims. For this reason, we propose the addition of the following words to the first paragraph of Principle 12:

“12.1. The active and informed participation of the disappeared person’s family members, relatives, legal representatives, counsel or any person authorized by them, just as that of non-governmental organizations for the protection of human rights, groups of victims and any other person with a legitimate interest should be guaranteed and protected at all stages of the search, without prejudice to the measures adopted to preserve the integrity and effectiveness of the criminal investigation or the search.

**Principle 14. The search should be conducted using a differential approach.**

In the second paragraph it is necessary to clarify that, in case there is any doubt about the age of the disappeared person, and if there is the possibility that he/she is an adolescent, he/she is treated as such. Furthermore, since there are many countries where adolescent marriage and other forms of acquisition of legal age are still allowed, the Principles must clarify that every person under the age of 18 should be treated under the differential approach for children and adolescents. The differential approach should also be considered as far as the children and adolescents who are family members of the disappeared person are concerned.

We propose, therefore, the following writing for paragraph 2:

14.2. The entities responsible for the search should pay special attention to cases involving disappeared children and adolescents, and develop and carry out search actions and plans that take into account the extreme vulnerability of disappeared children and adolescents and their family members. When disappeared children and adolescents are found and returned home, officials should respect the principle of the best interests of the child. If there is any doubt about the age of the victim, it will be presumed that he/she is less than 18 years old. This principle will also be applied if, by virtue of the national legislation, the victim has acquired the legal age without having turned 18, as well as when approaching to the disappeared person’s family members who haven´t reached the age of 18.

1. It was the “Gualtieri Rugnone de Prieto, Emma Elidia y otros s/ sustracción de menores de 10 años” sentence, case G. 291. XLIII, August 11, 2009 (Decisions 332:1835). Available at <https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verUnicoDocumentoLink.html?idAnalisis=670364&cache=1505995082643> [↑](#footnote-ref-1)
2. “Inocencia Luca de Pegoraro y otros vs. Argentina”, Petition P-242-03, recognized by the IACHR in its Report 160/10 (available at <https://www.cidh.oas.org/annualrep/2010sp/87.ARSA242-03ES.doc>). [↑](#footnote-ref-2)
3. Law 26.549, available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/160000-164999/160779/norma.htm> [↑](#footnote-ref-3)
4. In some occasions, it can be necessary to obtain the DNA of the suspects of forced disappearance, or of third persons who have possibly been in touch with the victim. [↑](#footnote-ref-4)
5. In our country’s experience, some “kidnapped children” were raised in violent and nearly criminal domestic environments. Some of them were put into correctional centers for adolescents or were sentenced for minor crimes when they came of age. [↑](#footnote-ref-5)
6. As a matter of fact, the Argentinean experience includes concrete examples of both hypotheses. [↑](#footnote-ref-6)
7. In Argentina, in some cases, a certain part of the disappeared child’s family does not have an interest in searching him/her or, directly, takes a position against his/her identification. It happened, for instance, that the maternal grandparents were dauntlessly committed to the search for their grandchild, while the paternal ones showed an indifferent and unwilling attitude towards this issue. On some rare occasions, it was necessary to forceful enter their domicile in order to obtain personal objects and gather DNA samples, following the procedure stated in the Law 26.549 as explained above. [↑](#footnote-ref-7)
8. See the Principles relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights (“Paris Principles”), adopted by Resolution 48/134 of the General Assembly. [↑](#footnote-ref-8)
9. See the report by Diane Orentlicher, independent expert in charge of the actualization of the Body of Principles for the fight against impunity, Human Rights Commission, E/CN.4/2005/102/Add.1. [↑](#footnote-ref-9)